

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 UNITED STATES OF AMERICA, CASE NO. 10cr4082WQH
12 Plaintiff,
13 vs. ORDER
14 GERARD CHARLES RICCIO, Defendant.
15

16 HAYES, Judge:

17 The matter before the Court is the motion to reconsider the grant of defendant's motion
18 to suppress evidence, and alternatively, motion for clarification. ECF No. 41.

19 **BACKGROUND**

20 On October 13, 2010, the Government filed an indictment charging the Defendant with
21 one count of receiving images of minors engaged in sexually explicit conduct in violation of
22 18 U.S.C. § 2252(a)(2), and one count of possession of images of minors engaged in sexually
23 explicit conduct in violation of 18 U.S.C. § 2252(a). ECF No. 1.

24 On August 5, 2011, the Court entered an order granting the Defendant's motion to
25 suppress evidence. ECF No. 40. The Court stated:

26 In this case, the Court must balance the possessory interest of the Defendant in
27 the hard drive seized by Officer Campbell with the important governmental
28 interests offered for the delay in securing a search warrant. The initial
interference with Defendant's possessory interest in this case was a result of
private action and did not violate the Fourth Amendment because of its private
character. Officer Campbell had probable cause to seize the hard drive based

1 upon the information provided by the private search “for a time necessary to
2 secure a warrant.” *Segura*, 468 U.S. at 806. The finding of probable cause to
3 seize the hard drive did not relieve law enforcement of its obligation to to
4 “diligently” obtain a warrant. *Dass*, 849 F.2d at 415 (“We reject the
government’s assertion that there is a contraband exception to the fourth
amendment.”). Defendant did not consent to the seizure of his hard drive by
Officer Campbell and maintained a possessory interest in his hard drive which
contained family photos.

5 Initially, there was a delay of sixteen days from the seizure on March 22, 2009
6 until April 7, 2009 when Detective Righthouse was assigned this case. The
7 record does not contain any facts or circumstances to explain this delay.
8 Detective Righthouse testified that she was assigned the case on April 7, 2009
9 and that she investigated the case. Detective Righthouse testified that she had
other ongoing active cases; and that she gave priority to cases involving live
juvenile victims, cases involving adult witnesses or victims, and cases that
involved anyone in custody. Detective Righthouse did not testify that her
workload or her case priorities prevented her from seeking a search warrant
before June 23, 2009. The Government did not present any specific facts to
explain the necessity of the seventy-five day delay in seeking a warrant. The
affidavit in support of the warrant prepared by Detective Righthouse primarily
relied upon the report of Officer Campbell and facts obtained early in the
investigation. There are no facts or circumstances advanced by the Government
from which the Court can conclude that the seventy-five day period was
necessary in order for Detective Righthouse to obtain the state search warrant.

14 Under the facts and circumstances in the record of this case, the Court concludes
15 that the ninety-one day delay in obtaining a warrant was not reasonable. The
warrant requirement protects against unreasonable assertions of executive
authority and assures that any seizure will be independently evaluated by a
neutral magistrate. *See United States v. Song Ja Cha*, 597 F.3d 995, 1004 (9th
Cir. 2010) (the limitations upon warrantless seizures protects “two goals of the
fourth amendment - deterring unreasonable police behavior and judicial
determination of probable cause.”). The Court concludes that the Fourth
Amendment rights of the Defendant were violated by the seizure and that the
evidence obtained from the hard drive must be suppressed as a direct result of
the constitutional violation. *Id.* at 1003-04. Defendant’s motion to suppress the
evidence from the hard drive seized from Paddock is granted.

20 ECF No. 40 at 10-11. The Court further concluded that the evidence found as a result of the
21 federal search warrant must be suppressed. The Court stated:
22

23 The record conclusively establishes that the information derived from the hard
drive, and suppressed as a direct constitutional violation, prompted the decision
24 by Detective Righthouse to seek a federal warrant to search the Defendant’s
home. The independent source doctrine will not avoid exclusion of the evidence
acquired as a result of a violation of the Defendant’s constitutional rights. *See*
25 *Murray*, 487 U.S. at 542. Under the facts of this case, neither the independent
source doctrine nor the good faith exception will avoid suppression of the
evidence found as a result of the federal search warrant. *See Song Ja Cha*, 597
F.3d at 703 (quoting *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir.
2000) (“there is no good-faith exception to the exclusionary rule for police who
do not act in accordance with governing law.”)).
28

Id. at 12-13 (footnote omitted).

CONTENTIONS OF THE PARTIES

2 Plaintiff United States of America moves the Court to reconsider the order suppressing
3 evidence. The Government asserts that the Court committed a significant error of law in
4 finding that the Defendant retained any possessory interest in his computer after Officer
5 Campbell opened a file on the computer and discovered child pornography. The Government
6 asserts that the actual discovery of child pornography by Officer Campbell eliminated any
7 lawful possessory interest in the computer and that any delay in obtaining a warrant cannot,
8 as a matter of law, form the basis for suppression. In addition, Plaintiff United States of
9 America asserts that any delay in obtaining a search warrant was the result of simple
10 negligence. Plaintiff United States asserts that the exclusionary rule should not be applied to
11 the evidence obtained from the federal search warrant based upon *Herring v. United States*,
12 555 U.S. 135 (2009).

13 Defendant asserts that the order suppressing evidence was made in accordance with law.
14 Defendant asserts that the viewing a single image of child pornography by Officer Campbell
15 did not permit indefinite detention of the computer or an unreasonable delay in obtaining a
16 search warrant. Defendant contends that the delay in this case violated the law and that
17 suppression is the proper sanction.

RULING OF THE COURT

19 Warrantless seizure is reasonable for a “time period ... no longer than reasonably
20 necessary for police, acting with diligence, to obtain the warrant.” *Illinois v. McArthur*, 531
21 U.S. at 332. Even a seizure based upon probable cause can violate the Fourth Amendment if
22 law enforcement does not act “diligently” in securing a warrant. *United States v. Dass*, 849
23 F.2d 414, 415 (9th Cir. 1988). This Court has concluded that the discovery of a single file
24 containing child pornography by a law enforcement officer justified the warrantless seizure of
25 the hard drive but does not conclude that this discovery negates any requirement to act with
26 diligence to secure a warrant. *Id.* at 415. (“We [] reject the government’s assertion that there
27 is a contraband exception to the fourth amendment.”). Based upon the facts and the reasons
stated in the order filed on August 5, 2010, the motion to reconsider the order that

1 “Defendant’s motion to suppress the evidence from the hard drive seized from Paddock is
2 granted” is denied. ECF No. 40 at 11.

3 The Court adheres to its ruling that “the record conclusively establishes that the
4 information derived from the hard drive, and suppressed as a direct constitutional violation,
5 prompted the decision by Detective Righthouse to seek a federal warrant to search the
6 Defendant’s home.” ECF No. 40 at 12-13. The police conduct in this case involved a mistake
7 of law and the good faith exception to the suppression of evidence does not apply to mistakes
8 of law. *United States v. Song Ja Cha*, 597 F.3d 995, 1005 FN8 (9th Cir. 2010) (“*Herring* did
9 not discuss mistakes of law, and our cases holding that the good-faith exception does not apply
10 to mistakes of law are still good law.”).

11 IT IS HEREBY ORDERED that the motion to reconsider the grant of defendant’s
12 motion to suppress evidence, and alternatively, motion for clarification is denied. ECF No. 41.

13 DATED: September 22, 2011

14 
15 **WILLIAM Q. HAYES**
16 United States District Judge

17
18
19
20
21
22
23
24
25
26
27
28